No. 82-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE: JOHNS-MANVILLE ASBESTOS CASES
APPEAL OF: DR. SAMUEL S. KELLER

DR. SAMUEL S. KELLER,

Petitioner,

vs.

JOHN M. McDANIEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the denial of a permanent injunction to prohibit the oral deposition of a non-party, when the deposition could cause irreparable physical and mental injury to that non-party, is an appealable order?

LIST OF PARTIES

Petitioner

DR. SAMUEL S. KELLER

Respondents

JOHN M. MCDANIEL
LEONARD SCOTT
VIRGIL AKER
ELMER BARTON
MARTIN BRIDGES
WALTER GEORGE
ROY GRISSOM
MERRILL KING
WARNER HAWTHORNE
MAMARTH KLIORA
OLEN SCOTT
JAMES STEDHAM

Defendants

JOHNS-MANVILLE CORPORATION
JOHNS-MANVILLE SALES CORPORATION
CANADIAN JOHNS-MANVILLE COMPANY, LTD.
CANADIAN JOHNS-MANVILLE ASBESTOS, LTD.
BELL ASBESTOS
FLINTKOTE CORPORATION
ASBESTOS CORPORATION
HOOKER CHEMICAL COMPANY
FIBREBOARD CORPORATION
COMBUSTION ENGINEERING
NORTH AMERICAN ASBESTOS
CALAVEROS ASBESTOS
BRINTO MINING LTD.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Dr. Samuel S. Keller, a non-party in *In Re: Johns-Manville Asbestos Cases*, 77 C 3534 (N.D. Ill.), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 9, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A, *infra*, pp. 1a-2a. The District Court Order is printed in Appendix A, *infra*, p. 3a.

JURISDICTION

The opinion of the Court of Appeals was entered on December 9, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

The statutory provisions involved are Sections 1291 and 1292(a)(1) of the Federal Rules of Civil Procedure, 28 U.S.C. §§1291, 1292(a)(1) (1976). Section 1291 provides, in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

Section 1292(a)(1) provides, in relevant part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .

STATEMENT

Petitioner, Dr. Samuel S. Keller, is not a party to the underlying litigation brought in the United States District Court for the Northern District of Illinois by certain present or former employees of the Johns-Manville Corporation's Waukegan, Illinois plant against Johns-Manville and others.[1] Dr. Keller was an independent contracting doctor at the Johns-Manville Waukegan plant from 1923 until early 1954. Dr. Keller assisted in the treatment of work related physical injuries, undertook pre-employment physical examinations and performed, or caused to be performed, some chest x-rays of then current or prospective employees.

Dr. Keller is now over ninety-one (91) years old, having left Johns-Manville almost thirty years ago. He was noticed for deposition in the underlying litigation in 1982. While Dr. Keller was preparing for his deposition, it became increasingly apparent that the mere anticipation of an oral deposition was exposing him to serious and substantial health risks. Accordingly, Dr. Keller's personal physician, Dr. William R. Darnall, was asked to provide his medical opinion concerning the advisability of proceeding with that deposition. Dr. Darnall expressed in a sworn affidavit his medical opinion that Dr. Keller should not be deposed, because of his age and physical and mental conditions. Dr. Keller had suffered a serious stroke in 1981 and was suffering from defects in memory and judgment, hardening of the arteries, and atrophy of

[1] This was one of numerous suits brought nationwide commonly referred to as the "asbestos litigation".

the brain. The physical and emotional stress that any deposition would place on him would, in Dr. Darnall's opinion, seriously threaten his health. Accordingly, a permanent injunction was sought to bar the taking of his deposition. The affidavit of Dr. Darnall supported the request for an injunction.

The injunction was denied and Dr. Keller appealed to the Seventh Circuit under 28 U.S.C. §1292(a)(1) and 28 U.S.C. §1291. The district court granted a stay of the deposition pending review by the Seventh Circuit, stating:

> I am going to grant the stay to permit the Court of Appeals to look at this issue, because if they view the marginal utility of this deposition in a different way from the manner in which I view it, that is what they are there for.

Transcript p. 4.

On appeal, the Seventh Circuit ordered the parties to submit memoranda on jurisdiction, addressing the question of whether "the district court order is really tantamount to an injunction which is appealable as of right." The Seventh Circuit, on December 9, 1982, held that "the order of the district court appealed from in this case is only a discovery order and not a final appealable order." Accordingly, that Court concluded that it was without jurisdiction to hear the matter.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below that it had no jurisdiction to entertain the appeal of a non-party in a discovery matter which could cause irrevocable damage to that non-party and which would not be rectified on appeal at the end of the underlying litigation, conflicts directly with the Tenth Circuit's decision in *Covey Oil Company v. Continental Oil Company*, 340 F.2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.Ed.2d 155, and its progeny. Further, it intensifies the conflict between circuits concerning the jurisdiction of the Circuit Courts to review discovery rulings made by the district courts which finally, irrevocably and irreparably affect the rights of non-parties. In *Covey Oil*, the Tenth Circuit considered the question of the appealability of a district court's denial of a motion to quash subpoenaes issued to non-party witnesses. Appeal was sought under 28 U.S.C. §1291, which states, in relevant part, that courts of appeals have jurisdiction "of appeals from all final decisions of the district courts of the United States."[2] Appellants, recognizing that generally such orders are not appealable because they are interlocutory to the main litigation, argued nevertheless that that rule should not apply to non-parties "who will suffer irreparable harm from the enforced disclosures and who have no recourse other than appeal from the order itself". 340 F.2d at 995. Appellants claimed that the denial of the motion to quash would cause irreparable harm to them because it would

[2] Unlike here, no effort was made in *Covey Oil* to also sustain jurisdiction under U.S.C. §1292(a)(1). 340 F.2d at 995 fn.3.

force them to reveal business trade secrets which could in turn destroy their business.

Respondents claimed that appellants could obtain automatic review by refusing to comply with the order and appeal from a subsequent adjudication of contempt. The Tenth Circuit, stating that it was "not impressed" with this legally precarious gauntlet, held that "non-party witnesses should not be required to expose themselves to the hazard of punishment in order to obtain a determination of their claimed rights." 340 F.2d at 996-997.

The Tenth Circuit, guided by this Court's instructions in *DiBella v. United States*, 369 U.S. 121 (1962), that the concept of finality must not be used to frustrate appellate review of an order collateral to the principal litigation "when the practical effect of the order will be irreparable to any subsequent appeal", 369 U.S. at 126, found the order to be appealable:

> What we have said does not mean that every order on a motion to quash a subpoena is appealable. Here we have a serious claim by non-party witnesses of a right to protection from the disclosure of trade secrets. Their claims are, in the language of *Swift & Co. Packers v. Compania Colombiani Del Caribe*, 339 U.S. 684, 689, 70 S.Ct. 861, 865, "fairly severable from the context of a larger litigious process." The practical effect of the order will be irreparable by any subsequent appeal. In our opinion the order is appealable.

340 F.2d at 997.

The Tenth Circuit followed its *Covey Oil* holding in *Saunders v. Great Western Sugar Company*, 396 F.2d 794 (10th Cir. 1968). The Fourth Circuit, in *North Carolina Association of Black Lawyers v. North Carolina Board of Law Examiners*, 538 F.2d 547 (4th Cir. 1976), cited the

Covey Oil decision with approval. In that case, the Fourth Circuit held that the refusal to issue a protective order against document discovery directed at a non-party law school was not appealable under 28 U.S.C. §§1291 or 1292, because it presented an intermediate procedural question—not a collateral one, resolvable without any reference to the substance of the action. 538 F.2d at 549.

In reaching the decision, the Fourth Circuit, however, was careful to distinguish *Covey Oil* on the ground that the *Covey Oil* appeal was properly taken because the ordered discovery there could provide a result which "would have been fatal to the interests of the discovered witnesses, non-parties to the litigation and without other safeguard". 538 F.2d at 549. As the Court observed:

> Appellant's distress is not unappreciated. Not a party to the action, it is unable to make its present point even after the final order in the case.

538 F.2d at 549.

In this case, the Seventh Circuit improperly applied a mechanical rule that all orders considered to be of a discovery nature are simply not appealable, regardless of the non-party status of the appellant, the finality of the order, the irreparable nature of the result, and the form of the requested order at the district court level. Such a mechanistic approach is directly in conflict with the rule of *Covey Oil* and this Court's directive in *DiBella*. If the deposition were to proceed and the warnings of Petitioner's doctor be proven accurate, the injury to the non-party could be irrevocable, and, perhaps, fatal. As in *Covey Oil*, Petitioner in this case will have no meaningful redress at the close of litigation. Any damage to Petitioner's health resulting from deposition cannot be rectified on a later appeal just as the damage sustained

by the businesses of the nonparties in *Covey Oil* could not have been alleviated by an appeal at the end of litigation.

The conflict between the Tenth, Fourth and Seventh Circuits is exacerbated by the Second Circuit's decision in *United States v. Fried*, 386 F.2d 691 (2nd Cir. 1967), where that Court, in denying jurisdiction over an appeal from the denial of a motion to quash a deposition subpoena on health grounds, held that the witness actually had to subject himself to a contempt proceeding to seek appellate review:

> If Fried is not exaggerating, *as the district judge thought he was*, he will continue his refusal and a more meaningful review can be had on the fuller record that will become available in the contempt proceeding. (emphasis added)

386 F.2d at 695.

The *Fried* case, while expressly rejecting the *Covey Oil* standard, is factually distinguishable from this case. In *Fried*, the Court clearly had reservations about the sincerity of Appellant's motives, the son of the defendant tax evader, the continued frustration of the government in attempting to collect long overdue taxes, and the danger to the prospective witness, which the district court thought was "exaggerated."

Clearly, the ability of a non-party to obtain appellate review of such an order as was entered here does, but should not, depend on the circuit wherein review is requested.

II.

The decision of the Court below conflicts with the express statutory language of 28 U.S.C. §1292(a)(1). That statute states, in relevant part:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . refusing injunctions."

Here, the district court was asked to forever enjoin the deposition of Petitioner, a man over 91 years old and in ill health. The permanent injunction was sought because his physician rendered a medical opinion that any deposition or fear of deposition, could permanently, seriously and irrevocably injure him.

The literal wording of the statute mandates that an order refusing an injunction be appealable as of right regardless of the posture of the other issues to be tried. As Senior Judge Swygert noted in *American Cyanamid Co. v. Lincoln Laboratories, Inc.*, 403 F.2d 486, 488 (7th Cir. 1968):

> Subsection 1292(a)(1) states that an interlocutory appeal may be taken from any district court order "granting, continuing, modifying, refusing or dissolving" an injunction. There is no language in this injunction subsection requiring finality of judgment.
>
> In fact, the term judgment does not appear in that subsection. The literal wording of the injunction provision leads us to believe that the other courts dealing with appeals relating to orders granting or denying an injunction have been correct in holding that such an order may be appealed under Section 1292(a)(1) regardless of the other issues to be tried in a case, that is, regardless of whether every issue has been finally adjudicated.

See also, Clean Air Coordinating Committee v. Roth-Adam Fuel Co., 465 F.2d 323 (7th Cir. 1972) (stay of proceedings wherein plaintiff sought a preliminary injunction constituted a refusal of injunction and the stay order was appealable); *Allico National Corporation v.*

Amalgamated Meat Cutters & Butcher Workmen of North America, 397 F.2d 727, 729 (7th Cir. 1968).

The motion for the issuance of a permanent injunction to prohibit the deposition constituted a separate and distinct action on behalf of a non-party. The issuance of the injunction was the substantive relief sought and the denial of an injunction disposed of all substantive relief sought. The refusal of an injunction, which is the only relief sought by the Petitioner, is precisely the type of situation governed by §1292. That section was enacted to allow appeal as of right from such an order. Counsel for Petitioner chose to appeal the denial of the injunction rather than instruct him not to testify and invoke a contempt citation because that fear, in and of itself, could have been dangerous to Petitioner's health. Yet if a contempt citation had been entered against the Petitioner, even the Second Circuit recognizes an appeal as of right. *United States v. Fried*, 386 F.2d 691 (2nd Cir. 1967). Clearly, appealability should not be predicated upon such formalistic distinctions.

III.

The decision below and the conflicts both among and within the Circuits warrant the exercise of this Court's supervisory power. In addition, the decision below raises important and fundamental questions concerning the access to appropriate legal redress for the non-litigant. Indeed this Court's silence in setting forth the appropriate safeguards for aggrieved non-litigants, brought into civil lawsuits at potentially great physical danger, is a matter which ought to be addressed.

Courts are understandably reluctant to allow parties to seek piecemeal, appellate review when judicial efficiency dictates a singular review 'en masse' of all claimed

trial court errors. In the case of the non-party, however, the situation is entirely different. While the issue may be a discovery matter to the combatants, it can be a final, serious and irreparably harmful matter to the non-party. The concept of appealing when the underlying lawsuit is final is meaningless to the non-party. If the decision of the trial judge is in error, the damage has been done. To suggest that a non-litigant subject to great health hazard be forced to be held in contempt to obtain appellate review, as *Fried* seems to suggest, is an affront to all concepts of fundamental fairness and logic.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 9, 1982.

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

IN RE:
JOHNS-MANVILLE ASBESTOS CASES.

No. 82-2357 vs.

APPEAL OF:
DR. SAMUEL S. KELLER.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 3534—**Milton I. Shadur**, *Judge.*

This matter comes before the Court for its consideration upon the following documents:

1. The "PLAINTIFF'S MEMORANDUM ON JURISDICTION" filed herein on September 14, 1982,
2. The "MEMORANDUM IN SUPPORT OF THE JURISDICTIONAL BASIS FOR THE APPEAL OF DR. SAMUEL S. KELLER, filed herein on September 14, 1982,

3. The "SUGGESTION OF STAY" filed herein on September 14, 1982, by counsel for the defendant,
4. The "STATEMENT OF APPELLANT, DR. SAMUEL S. KELLER" filed herein on October 12, 1982.

The order of the district court appealed from in this case is only a discovery order and not a final appealable order. This Court is without jurisdiction to hear this matter.

DISMISSED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Shadur

Cause No. 77 C 3534 Date Aug. 3, 1982

Title of Cause John D. McDaniel, et al. vs. Johns-Manville Sales Corp. et al.

Brief Statement of Motion Motion to Enjoin The Taking of The Oral Deposition of Dr. Samuel S. Keller.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel McConnell, Ruberry & Jansen, 135 S. LaSalle St., Ste. 4310, Chicago, Ill. 60603

Representing Dr. Samuel S. Keller

Names and Addresses of other counsel entitled to notice and names of parties they represent. John C. Bulgar, Cooney & Stern, 77 W. Washington St., Ste. 1632, Chicago, Ill. 60602

Reserve space below for notations by minute clerk

Motion of Samuel S. Keller to enjoin the taking of his oral deposition is denied.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.